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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION**

HUAWEI TECHNOLOGIES CO., LTD.,  
 HUAWEI DEVICE USA, INC., and  
 HUAWEI TECHNOLOGIES USA, INC.,

Plaintiffs / Counterclaim-Defendants,  
 v.

SAMSUNG ELECTRONICS CO., LTD.,  
 SAMSUNG ELECTRONICS AMERICA,  
 INC.,

Defendants / Counterclaim-Plaintiffs,

and

SAMSUNG RESEARCH AMERICA,

Defendant,  
 v.

HISILICON TECHNOLOGIES CO., LTD.,  
 Counterclaim-Defendant.

Case No. 16-cv-02787-WHO

**HUAWEI’S REPLY IN SUPPORT OF ITS  
 MOTION TO PRECLUDE SAMSUNG’S  
 FRAND EXPERTS FROM OFFERING  
 IMPROPER LEGAL OPINIONS**

Hearing Date: August 8, 2018  
 Time: 2:00 p.m.  
 Location: Courtroom 2, 17th Floor  
 Judge: Hon. William H. Orrick

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1 Plaintiffs Huawei Technologies Co., Ltd., Huawei Device USA, Inc. and Huawei  
 2 Technologies USA, Inc. (collectively, “Huawei”) hereby reply to Samsung’s opposition to Huawei’s  
 3 Motion to Preclude Samsung’s FRAND Experts From Offering Improper Legal Opinions (ECF No.  
 4 349-4) (hereafter, “Opp’n”).

## 5 I. INTRODUCTION

6 To be admissible, expert testimony must not only be relevant and reliable, but the expert  
 7 must also be qualified by “knowledge, skill, experience, training, or education” on the proposed  
 8 subject matter. *Fidelity Nat’l Fin., Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. 09-CV-  
 9 140-GPC-KSC, 2014 WL 1286392, at \*1 (S.D. Cal. Mar. 28, 2014). In an attempt to salvage the  
 10 improper legal testimony offered by Samsung’s experts Michael Davies and Jerry Hausman,  
 11 Samsung contends that the challenged opinions are (1) within the experts’ expertise, and (2) merely  
 12 articulations of the “legal framework” underlying their experts’ opinions. Neither defense of the  
 13 challenged testimony is accurate.

14 As is explained in Huawei’s motion (ECF No. 329) (hereafter, “Mot.”), neither Mr. Davies  
 15 nor Prof. Hausman have—or claim to have—**legal** expertise in the field of antitrust, and the  
 16 challenged statements made by these experts—for example, incorrect statements of the law,  
 17 proposals about what the law should be, legal rules for the pursuit of injunctions on SEPs, and legal  
 18 conclusions as to the outcome of Samsung’s FRAND-related counterclaims—are not merely legal  
 19 **assumptions** underlying their opinions, but rather the epitome of improper legal **instructions** and  
 20 **conclusions** themselves. As the Ninth Circuit noted in *Hangarter v. Provident Life and Accident*  
 21 *Ins. Co.*, a case cited in Samsung’s opposition (Opp’n 12), “an expert witness cannot give an opinion  
 22 as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law” and “instructing the jury as to  
 23 the applicable law is the distinct and exclusive province of the court.” *Hangarter v. Provident Life*  
 24 *and Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (citations and quotations omitted). Even  
 25 if certain of Prof. Hausman and Mr. Davies’ statements could be construed as merely legal  
 26 assumptions underlying their opinions, those legal assumptions would need to be **correct** statements  
 27 of the law in order to be admissible. *Villalpando v. Exel Direct Inc.*, 161 F. Supp. 3d 873, 895 (N.D.  
 28 Cal. 2016) (“[A]n expert’s reliance on *incorrect* legal assumptions would warrant exclusion . . .”).

1 Whatever Prof. Hausman and Mr. Davies' qualifications may be, they are not entitled to usurp the  
 2 role of the Court and jury by offering Samsung's unsupported statements of the law and legal  
 3 conclusions. The law is clear that improper legal opinions (like those offered by Prof. Hausman and  
 4 Mr. Davies) are both unhelpful to the jury and in fact invade its province. They are therefore  
 5 inadmissible under Rule 702 and should be excluded.

## 6 **II. MR. DAVIES' IMPROPER LEGAL OPINIONS ARE INADMISSIBLE.**

7 A central tenant of expert testimony is that it must be helpful to the trier of fact. Fed. R.  
 8 Evid. 702. Opinions that (i) contain unsupported (and incorrect) statements of the law, or (ii) are  
 9 irrelevant to the expert's assignment fail to meet this basic requirement. The challenged opinions of  
 10 Mr. Davies fall within these categories.

11 Mr. Davies has opined that "[i]f a patent holder holds patents of the type where there were a  
 12 number of credible alternative implementations prior to a single implementation being selected for  
 13 incorporation into the standard, the patent holder would be *in violation of antitrust regulations* by  
 14 asking for an injunction" and that an injunction "*should not be granted*" in such circumstances.  
 15 Decl. of Sam Stake in Support of Samsung's Opp'n to Huawei's Mot. ("Stake Decl." ECF No. 351-  
 16 1) Ex. 1, Davies Rpt. ¶ 27 (emphasis added), ECF No. 351-2. As explained in Huawei's motion  
 17 (Mot. 3), these statements are a baseless and incorrect articulation of the legal standard governing  
 18 injunctive relief on SEPs, have no utility to the jury, and in fact will only lead to needless confusion  
 19 if admitted.<sup>1</sup>

20 Samsung admits in its opposition that experts "cannot invade the province of the court to  
 21 instruct on the law." Opp'n 2 (quoting *Fidelity*). When an expert states legal conclusions or legal  
 22 rules, the "testimony is not 'helpful' because the trial judge instructs the jury on the law." *Fidelity*,  
 23 2014 WL 1286392, at \*8 (citation omitted). Nevertheless, that is exactly what Mr. Davies attempts  
 24 to do in the challenged portions of his report. Whether injunctive relief on SEPs is appropriate under  
 25

26 <sup>1</sup> As explained in Huawei's motion, Mr. Davies' opinions will be confusing to the jury not only  
 27 because they are inconsistent with relevant case law and regulatory guidance, but also because they  
 28 are inconsistent with Samsung's prior positions on this very issue. For example, in litigation with  
 Apple, Samsung itself sought injunctive relief on its SEPs and took the unqualified position that  
 doing so was consistent with the ETSI IPR Policy. See Mot. 4 (quoting Samsung's argument that  
 "nothing in any ETSI rule or policy precludes or could preclude injunctions.").

1 the antitrust laws is a “pure legal matter” on which the Court—not Mr. Davies—will instruct the  
 2 jury. Moreover, Mr. Davies’ opinions regarding whether Huawei’s conduct violates antitrust  
 3 regulations or whether Huawei should be able to pursue injunctions for infringement of the SEPs in  
 4 its global portfolio—two of the forms of legal relief requested in Samsung’s counterclaims (*see*  
 5 Samsung Answer and Amended Counterclaims, at Prayer for Relief C, J)—are directed to “the exact  
 6 legal question[s] that the Court [or jury] itself will decide.” Opp’n 2 (quoting *Pokorny v. Quixtar*  
 7 *Inc.*, No. 07-00201 SC, 2007 WL 1932922, at \*2-3 (N.D. Cal. June 29, 2007)).<sup>2</sup>

8 Contrary to Samsung’s assertions, the challenged opinions are not “well-grounded in Mr.  
 9 Davies’ experience” as an electrical engineer. Opp’n 1. Samsung’s recitation of Mr. Davies’  
 10 professional experience and past work as an expert witness (Opp’n 2-3) is irrelevant to the instant  
 11 motion directed to Mr. Davies’ improper, baseless, and irrelevant legal opinions. As explained in  
 12 Huawei’s motion, Mr. Davies disclaims any expertise in economics or antitrust. Mot. 3. [REDACTED]

13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED] All of this is  
 16 unsurprising, given that Mr. Davies confirmed that his improper legal opinions were not merely legal  
 17 understandings provided by counsel (and indeed the opinions are not phrased as such in his report),  
 18 and Mr. Davies failed to identify a single citation in support of those opinions in his report [REDACTED]  
 19 [REDACTED] *Id.*<sup>3</sup>

20 Finally, the challenged portions of Mr. Davies’ opinions are entirely irrelevant to his  
 21 assignment in this case. Mr. Davies’ assignment was to “examine several patents and to determine  
 22 whether or not there were *technically* feasible alternatives that could have been chosen as the basis  
 23 for the relevant standard.” Stake Decl. Ex. 1, Davies Rpt. ¶ 21 (emphasis added). To complete that

24 <sup>2</sup> As noted in Huawei’s motion, Huawei has not pursued injunctive relief for infringement of its U.S.  
 25 SEPs asserted in this action, and the question of whether injunctive relief is appropriate for  
 26 Samsung’s infringement of Huawei’s Chinese SEPs has already been considered and disposed of by  
 the Shenzhen Court. Mot. 3.

27 <sup>3</sup> Mr. Davies’ comments on FRAND, antitrust, and injunctive relief are also cumulative of—and  
 28 often inconsistent with—the opinions offered by Samsung’s other experts, Dr. Leonard, Prof.  
 Hausman, and Prof. Borghetti. For example, while each of those experts comment on the topic of  
 pursuing injunctive relief for infringement of SEPs, none of them seem to share Mr. Davies’ view  
 that an antitrust violation results if there were credible alternatives to the SEP at issue.

1 assignment, Mr. Davies assessed the patents, other technologies allegedly available at the time, and  
 2 the standard itself. However, Mr. Davies' report also strays far afield of these topics, offering a  
 3 stand-alone section entitled "On the Nature of Standard Essential Patents and Antitrust" that is  
 4 wholly irrelevant to his assignment. Mr. Davies' statements in this section of his report on antitrust  
 5 regulations and injunctions (Stake Decl. Ex. 1, Davies Rpt. ¶ 27), the "standard-setting process[,]  
 6 SEPs," and "way[s] of satisfying the FRAND requirements" (Opp'n 4, 6; Stake Decl. Ex. 1, Davies  
 7 Rpt. ¶¶ 22-24, 26), and "the value that a company is entitled to recover for an SEP" (Opp'n 5; Stake  
 8 Decl. Ex. 1, Davies Rpt. ¶ 25) play *no role* in his technical assessment of feasible alternatives to the  
 9 patents he reviewed in the remainder of his report.<sup>4</sup> Mr. Davies can testify to the jury about his  
 10 technical assessment of those patents, a subject within his expertise in electrical engineering, but  
 11 should not be permitted to offer his legally incorrect and extraneous commentary "On the Nature of  
 12 Standard Essential Patents and Antitrust."<sup>5</sup>

### 13 **III. PROF. HAUSMAN'S IMPROPER LEGAL OPINIONS ARE INADMISSIBLE.**

14 Samsung contends that Prof. Hausman's opinions are appropriately economic in nature and  
 15 therefore within his expertise. But contrary to Samsung's claim, Prof. Hausman's challenged  
 16 opinions are not merely "underlying" legal framework for his competitive analysis of injunctions  
 17 and other economic issues. Opp'n 7, 13. Taken at face value, the challenged opinions are clearly  
 18 legal in nature, opining on the ultimate legal issue of whether Huawei's conduct constitutes a  
 19 violation of U.S. antitrust law and presenting—irrelevantly—Prof. Hausman's personal views on  
 20

21 <sup>4</sup> Samsung argues Mr. Davies is entitled to summarize the legal framework in which he "appl[ies]  
 22 'complex facts,'" (Opp'n 6), but offers no example of how Mr. Davies' assessment of technical  
 23 alternatives to certain patents necessarily entails consideration of FRAND, patent valuation,  
 24 injunctions, or antitrust issues. Samsung's further contention that Mr. Davies "provides technical  
 25 opinions supporting Samsung's antitrust case" (Opp'n 7) does not warrant permitting Mr. Davies to  
 26 testify on legal and economic issues he admits to have no expertise in. Mot. 3.

27 <sup>5</sup> Samsung's suggestion that Huawei "does not object to the correctness of any of the content" of Mr.  
 28 Davies' challenged opinions (Opp'n 4-6) is incorrect. As a threshold matter, whether Huawei  
 challenges the accuracy of Mr. Davies' improper opinions is irrelevant to the question of whether  
 they are admissible. But moreover, in this case, Huawei has offered extensive and well-qualified  
 expert testimony from, for example, Mr. Lasinski and Dr. Padilla on the topics of the economic  
 interpretation of FRAND commitments, the value of SEPs, and the economics of pursuing injunctive  
 relief on SEPs. Those experts offer opinions that contrast significantly with the improper legal  
 opinions Mr. Davies has offered. Samsung does not contend that Mr. Davies' unqualified opinions  
 on these issues are offered in rebuttal to Huawei's experts, and permitting Mr. Davies to testify on  
 such topics outside his expertise would only lead to needless confusion for the jury.

1 what the legal rule in the United States *is or should be* with respect to injunctions on SEPs. Such  
 2 opinions are inappropriate under black letter law and Prof. Hausman should be precluded from  
 3 presenting them at trial because they will be confusing and unhelpful to the jury, and ultimately  
 4 usurp the role of the Court and jury in deciding this case. Samsung's arguments to the contrary are  
 5 unpersuasive.

6 There can be no doubt that Prof. Hausman's challenged statements go beyond merely  
 7 "assist[ing] the jury understand [complex] facts" (Opp'n 8), and instead provide improper  
 8 conclusions precisely directed the ultimate legal issues Samsung's antitrust counterclaim asks the  
 9 jury and this Court to decide: whether or not Huawei has violated Section 2 of the Sherman Act, and  
 10 if so, whether Huawei can obtain injunctive relief for infringement of its SEPs. *See, e.g., Pokorny*,  
 11 2007 WL 1932922, at \*2 (noting that an expert opinion is clearly inadmissible where "if the Court  
 12 accepts [the] testimony... there is no need for inference or further analysis, as the ultimate question  
 13 of law will be resolved."). Although Samsung tries to dispute this, it ultimately admits that Prof.  
 14 Hausman opines "that Huawei's SEP abuses violated U.S. antitrust laws." Opp'n 13. This is made  
 15 even more clear in Prof. Hausman's challenged statements, where, for example, he opines that  
 16 Huawei's conduct is [REDACTED] (Decl. of Leif Peterson in Support of Huawei's Mot.  
 17 ("Peterson Decl." ECF No. 329-1) Ex. 2, Hausman Rpt. ¶ 56, ECF No. 327-25) and that Huawei's  
 18 injunctions [REDACTED]  
 19 [REDACTED] (*Id.* ¶ 58)—*i.e.*, "the exact legal  
 20 question[s] the Court itself will decide" in this case. Opp'n 2 (quoting *Pokorny*, 2007 WL 1932922,  
 21 at \*2-3). Even the case law cited by Samsung (Opp'n 7) confirms that Dr. Hausman's challenged  
 22 opinions must be excluded. *See, e.g., U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union*  
 23 *No. 3, AFL-CIO*, 313 F. Supp. 2d 213, 240-41 (S.D.N.Y. 2004) (holding an expert "would not be  
 24 permitted to state that the defendants did or did not engage in anticompetitive conduct").

25 Prof. Hausman's challenged testimony is also replete with his unsupported personal views on  
 26 what the legal rule *should be* in the United States with respect to injunctions on SEPs. Such views  
 27 stray beyond mere "economic analysis" (Opp'n 8-11 (attempting to characterize Prof. Hausman's  
 28 challenged testimony as such)) and directly into the Court's role in instructing the jury on the law.



1 For example, Prof. Hausman states that [REDACTED]

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED] Peterson Decl. Ex. 2, Hausman Rpt. ¶ 57

5 (emphasis added). At his deposition, Prof. Hausman [REDACTED]

6 [REDACTED] Mot. 4 (quoting Prof. Hausman's deposition  
7 testimony that [REDACTED]

8 [REDACTED] This fact alone sets Prof. Hausman's opinion apart from the *Fleischman* and *Hangarter*  
9 cases Samsung cites (Opp'n 12-13), where experts relied on "well accepted" economic factors and  
10 merely referenced legal statutes (rather than drawing conclusions based on those statutes). By  
11 contrast in *Fidelity*, another case cited by Samsung, the court explained that an expert's opinions that  
12 are in conflict with the prevailing legal standards are inadmissible because opinions about a  
13 "conflicting standard would confuse the jury." 2014 WL 1286392 at \*3.<sup>6</sup>

14 Elsewhere in his reports, Prof. Hausman misleadingly implies that his personal views are in  
15 fact the law. For example, he states that there is a [REDACTED]  
16 [REDACTED] Peterson Decl. Ex. 2, Hausman Rpt. ¶ 32. But, as explained in Huawei's motion,  
17 the prevailing rule articulated by the Federal Circuit, competition regulators, and even Samsung  
18 itself in prior litigation is that there is no per se rule against injunctions on SEPs. Mot. 3 (citing, for  
19 example, *Apple v. Motorola*).

20 Although Prof. Hausman is undoubtedly a qualified expert in the field of economics, Prof.  
21 Hausman's deposition testimony makes clear that he is not an expert on antitrust law, and his  
22 conclusions as to antitrust law—[REDACTED]  
23 [REDACTED] (Stake Decl. Ex. 3, Hausman Rpt. ¶ 8, ECF No.  
24 329-10)—are therefore not within his expertise. For example, at his deposition [REDACTED]

25 [REDACTED]  
26 [REDACTED]  
27 <sup>6</sup> Notably, Samsung's opposition even concedes that Prof. Hausman's opinions of the type quoted in  
28 the paragraph above are legal in nature. Opp'n 8-12 (noting that only the bolded statements, which  
in Samsung's opposition do not include the language quoted above, are "not legal in nature").

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED] Decl. of Leif Peterson in Support of Reply to  
 5 Mot. (“Peterson Reply Decl.”) Ex. 6, Hausman Dep. (June 19, 2018) 193:18-200:20. Such a  
 6 manifest misunderstanding of the law in this area makes clear that Prof. Hausman’s challenged  
 7 opinions on what the law is or should be in this area are affirmatively unhelpful to, and likely to  
 8 confuse, the jury. In any event, regardless of Prof. Hausman’s qualifications and whether he has  
 9 offered his opinions on antitrust issues in other litigation and non-litigation contexts (Opp’n 7-8), he  
 10 is not qualified to offer indisputably legal opinions and conclusions to the jury in this case. *Pokorny*,  
 11 2007 WL 1932922 at \*2 (“The Court need not address... concerns about [an expert’s]  
 12 qualifications... because his declaration offers an opinion on the exact legal question that the Court  
 13 itself will decide.”). Those responsibilities are reserved for the Court and jury exclusively.<sup>7</sup>

14 Samsung’s suggestion that Dr. Padilla’s opinions fall victim to the same issue as Prof.  
 15 Hausman’s (Opp’n 13) is incorrect. Unlike Prof. Hausman’s challenged testimony, Dr. Padilla has  
 16 appropriately analyzed the *economic* ramifications of the pursuit of injunctive relief on SEPs, but  
 17 takes no position on whether certain conduct would or would not violate U.S. antitrust law, a  
 18 question on the ultimate conclusion of Samsung’s claim that—if not dismissed on summary  
 19 judgment—must appropriately be left to the Court or jury, not expert witnesses. For example, while  
 20 Prof. Hausman has opined that Huawei’s conduct would result in [REDACTED]

21 [REDACTED] (Peterson Decl. Ex. 2, Hausman Rpt. ¶ 56), the language Samsung quotes from Dr.  
 22 Padilla’s report makes clear that Dr. Padilla merely comments on the issue of injunctive relief “from  
 23 the perspective of economic and competition policy,” not as a matter of U.S. antitrust law. Opp’n  
 24 13. This distinction is critical. *See, e.g., Fidelity*, 2014 WL 1286392 at \*8 (noting that whether  
 25 expert testimony is impermissibly legal “depends upon how the expert expresses his opinion.”); *U.S.*  
 26 *Info. Sys.*, 161 F. Supp. at 240-41 (explaining the distinction between offering conclusions regarding

27 <sup>7</sup> Likewise, whether Prof. Hausman’s *economic* opinions in other cases have been found admissible  
 28 (Opp’n 13) is irrelevant to the issue of whether the improper *legal* opinions he has offered here are  
 admissible. They are not.

1 whether conduct is anticompetitive and economic analysis of factors that might indicate  
2 anticompetitive effect). As a result, Dr. Padilla's opinions are entirely appropriate under Rule 702,  
3 while Prof. Hausman's opinions must be excluded for improperly invading the province of the Court  
4 and jury.

5 As this distinction should make clear, Samsung's suggestion that Huawei's motion to  
6 exclude Dr. Hausman's testimony "would mean that expert economics could *never* opine as to the  
7 economic effects of an injunction" (Opp'n 13) is a strawman. Huawei does not seek to exclude Dr.  
8 Hausman's *economic* analysis, and indeed has offered economic analysis from Dr. Padilla on the  
9 topic of injunctions. Huawei merely seeks to exclude Prof. Hausman's improper *legal* opinions and  
10 conclusions, which are inadmissible under black letter law and should not be offered to the jury.  
11 *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (experts "do not testify about  
12 the law.").

#### 13 **IV. CONCLUSION**

14 For all of the foregoing reasons, and those explained in Huawei's Motion to Preclude  
15 Samsung's FRAND Experts from Offering Improper Legal Opinions, Huawei respectfully requests  
16 this Court preclude Samsung's expert Michael Davies from offering the opinions in paragraphs 21 to  
17 27 of his report at trial, and preclude Samsung's expert Jerry Hausman from offering the legal  
18 opinions in paragraphs 32, 56, 57 and 58 of his opening report and paragraph 14 of his rebuttal  
19 report at trial.  
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1 Dated: July 24, 2018

Respectfully submitted,

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